

**UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF NORTH CAROLINA
ASHEVILLE DIVISION**

NO. 1:18-CR-00092-MR-WCM

UNITED STATES OF AMERICA)	
)	
v.)	SECOND
)	MOTION TO CONTINUE
JAMES E. MACALPINE,)	DOCKET CALL/ TRIAL
Defendant.)	

The Defendant, through the undersigned counsel, without objection from the Assistant United States Attorney, hereby moves to continue the above-scheduled matter, currently set for Docket Call/Trial on January 14, 2019 at 9:00 a.m. In support of this motion, the Defendant states the following:

1. That the Defendant was Indicted on August 8, 2018 and charged with Attempting to Evade or Defeat Tax by Evasion of Payment (26 U.S.C. § 7201) and Interference with the Administration of Internal Revenue Laws (26 U.S.C. § 7212). Thereafter, on August 10, 2018, he had his Initial Appearance before the Honorable Dennis Lee Howell, U.S. Magistrate Judge. He was advised then of his counsel rights and elected to proceed pro se, and requested and was denied standby counsel. Also on August 10, 2018, Judge Howell issued an oral order granting a continuance pursuant to 18 U.S.C. § 3161(c)(2), moving the Docket Call/Trial from September 4, 2018 at 9:00 a.m. to November 7, 2018 at 9:00 a.m.

2. A hearing was held on October 24, 2018 before the Honorable David C. Keesler, U.S. Magistrate Judge. At this hearing, the Government hand delivered discovery to the Defendant (they had previously sent him a letter on August 17, 2018 advising him on how to pick up discovery) and the Court ordered the appointment of standby counsel. The undersigned was assigned the role of standby counsel for the

Defendant on Monday, October 29, 2018 and was able to pick up discovery in this case on Tuesday afternoon, October 30, 2018.

3. On November 1, 2018, the undersigned counsel, then in my capacity as “standby counsel,” filed an initial Motion to Continue Docket Call/Trial asking that the trial in this matter be moved from the November 7, 2018 term of criminal court. By Order dated November 2, 2018, the Court granted the motion and continued the Docket Call/Trial to January 7, 2019. A pretrial hearing was held on November 6, 2018 before the Honorable Martin Reidinger, United States District Judge. At that hearing, the Court addressed the Defendant’s pro se status and encouraged the Defendant to consider allowing the undersigned to represent him in a traditional defense counsel role. Since that date the undersigned has reviewed nearly 16,000 pages of discovery and 13 hours of audio recordings and I have met with the Defendant on multiple occasions for a number of hours to assist him in preparing to handle the jury trial in a pro se manner. During this preparation, the Government sought and we had no objection to a request that the presentation of evidence in this case not begin until January 14, 2019. By Order issued December 27, 2018, the Court set the jury selection in this case to begin January 7, 2019, and the presentation of evidence to begin on January 14, 2019. By Notice of Hearing issued on January 2, 2019, the Court set jury selection to begin on January 14, 2019.

4. Today, in a final preparation session with the Defendant, he made a series of written elections on how to proceed in this case. Those elections have been filed with the Court earlier tonight noting that the Defendant has now elected to stop proceeding pro se and to be represented by the undersigned counsel as his defense counsel. He additionally raised a concern that he had not received documents he had previously requested from the Government that he feels he needs to defend the charges in this matter. Specifically, he had made Freedom of Information Act (FOIA) requests upon the Social Security Administration (SSA), the Internal Revenue Service (IRS), and the Customs and Immigration Service (CIS). These requests asked for his total earnings of

record, his Individual Master File from the IRS, and his citizenship status from the CIS. He specifically requested that a motion to continue the case be filed to allow more time to receive these requested documents. At present, it is his belief that the current “shutdown” of the federal government is preventing any processing of his requests. Finally, at the conclusion of our meeting, shortly after 5:00 p.m. today, the Defendant, despite the earlier election he made to go to trial and forego any cooperation or guilty plea and plea agreement with the Government, asked that I talk with the Government about a plea agreement and his cooperation with federal authorities.

5. The undersigned contacted the Assistant United States Attorney (AUSA) in this case, Daniel Bradley, late this afternoon to advise him of the counsel change, the Defendant’s desires regarding a possible plea agreement, and to get his input on this motion to continue. During this phone call, Mr. Bradley advised me that he had sent me an email at 5:43 p.m. today, January 9, 2019, advising that the Government had discovered additional evidence to disclose to the defense that was uncovered in the course of pretrial preparation of a IRS witness. That evidence, consisting of Bates stamped pages 15,921 through 18,099 and an audio file of unknown duration, was emailed to me later this evening; however, I have not been able to download and review any of it at this point, despite several attempts to do so. Mr. Bradley’s position on this motion is that he would have opposed the motion for the reasons stated in the preceding paragraph; however, he does not oppose it in light of the recently discovered and un-reviewed evidence. Further, in a phone call later tonight, Mr. Bradley advised me that the Government was interested in pursuing plea agreement negotiations with the Defendant and his cooperation.

6. The undersigned counsel submits that the granting of this motion to continue could possibly result in the savings of limited judicial resources through the smoother progression to completion of this matter, including the possibility of avoiding a trial altogether should plea negotiations prove fruitful. The additional time requested

would be required to provide the undersigned counsel and the Defendant the time necessary to prepare for a trial in light of the as yet un-reviewed additional discovery and provide the Defendant with effective assistance of counsel. The ends of justice served by the granting of this motion outweigh the interests of the public and the Defendant in a speedy trial.

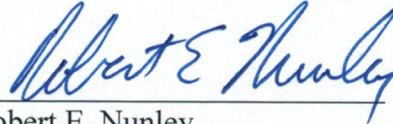
7. Should the Court not be willing to grant this continuance request, it is requested that the Docket Call/Trial in this matter not start until after 12:00 p.m. on Monday, January 14, 2019, in light of the adverse weather forecasts for that lead-up weekend and morning. As of the 11:30 p.m. local news on WLOS-13 TV tonight, snow and icy roads are being forecasted for Yancey County and other areas to the north of Asheville, North Carolina from the 12th through the 14th of January. The undersigned counsel lives in northeast Yancey County on top of a ridgeline with a $\frac{3}{4}$ mile driveway that descends 600 feet to the nearest paved road just South of the North Carolina/Tennessee state line and in the shadow of Roan Mountain, Tennessee. Any substantial snow storm or a minimum of icing on the roads will severely affect the undersigned counsel's ability to make the more than one hour drive to Asheville for court in a timely fashion to arrive in time to start at 9:00 a.m. Such weather conditions would also most likely affect the ability of other court personnel or prospective jurors to travel safely in a timely fashion to Asheville for the trial. A delay until after 12:00 p.m. would allow more time for safer, slower travel and hopefully less icy or snow covered roadways.

WHEREFORE, the Defendant, through counsel and without objection from the Government, requests that his Docket Call/Trial, presently scheduled for Monday, January 14, 2019, be continued to the Court's next term of criminal court, presently scheduled for March 4, 2019. In the alternative, should the Court deny the foregoing continuance of the Docket Call/Trial, the Defendant asks that the Court delay the start of

any proceedings on January 14, 2019 until after 12:00 p.m. to allow the undersigned and others more time to make the trip to Asheville for court on that day.

Respectfully submitted, this the 9th day of January, 2019.

NUNLEY & ASSOCIATES, P.L.L.C.



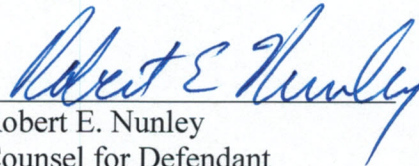
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was served via CM/ECF upon:

Daniel V. Bradley
Assistant United States Attorney for the Western District of North Carolina
United States Attorney's Office
Federal Courthouse
100 Otis Street
Asheville, NC 28801

Respectfully submitted, this the 9th day of January, 2019.



Robert E. Nunley
Counsel for Defendant